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No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, *Petitioner*

v.

WALKER BANK & TRUST COMPANY, A CORPORATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF

JAMES A. FOOTE
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 51

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, *Petitioner*

v.

WALKER BANK & TRUST COMPANY, A CORPORATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF

STATUTES INVOLVED

In addition to the statutes cited by the Petitioners, Utah Code Annot. Section 7-3-6.3 (Supp. 1965) is involved:

> From and after the effective date of this act no unit bank and no branch bank shall be established or authorized to conduct a banking business except as hereinbefore in section 7-3-6 expressly provided.

The effective date was March 13, 1953.[1]

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[1] Laws of Utah, ch. 8, § 5 (1953).

QUESTION PRESENTED

The question presented is whether Section 36(c) (1) of the National Bank Act [2] authorizes the establishent by a national banking association of a branch bank in the city in which it is situated when under applicable state law a state bank would be prohibited from establishing the branch.

STATEMENT OF THE CASE

This case was submitted to the United States District Court for the District of Utah for its decision on the merits upon the facts stipulated by the parties [3] which, briefly summarized, are as follows:

On or about November 9, 1962, the Petitioner, The First National Bank of Logan ("Petitioner Bank"), applied to James J. Saxon, Comptroller of the Currency ("Comptroller") for authority to establish a branch bank in the city of Logan, Utah, which is a city of the second class as cities are classified by the statutes of the State of Utah.

On January 21, 1963 the Comptroller issued his certificate approving and authorizing the Petitioner Bank to establish and operate a branch in Logan, Utah and on that date the Petitioner Bank commenced regularly to transact a customary banking business at the branch so authorized. In establishing the branch, the Petitioner Bank did not take over an existing bank. The Petitioner Bank will continue to operate the branch bank, unless enjoined by the court from so doing.

Prior to the Comptroller's authorization for the establishment of the branch bank, the Petitioner Bank regularly transacted a customary banking business at its banking

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[2] Glass-Steagall Act § 23, 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964).

[3] R 11, 15, 16.

house located at 99 North Main Street, Logan, Utah. At and prior to the time of the issuance of the Comptroller's certificate of authority, the Walker Bank & Trust Company ("Respondent"), was regularly transacting a customary banking business at its branch bank located in the city of Logan, which it had acquired as the resulting bank of a statutory merger on December 8, 1956 whereby Cache Valley Banking Company, a state bank theretofore operating as a unit bank in Logan, was merged with Respondent Bank. At the time of the commencement of this action Respondent had demand and time deposits at that branch in excess of $10,000,000, outstanding loans in excess of $5,000,000 and investments in furniture, fixtures and leasehold improvements in excess of $50,000. First Security Bank of Utah, N.A., a party to the case consolidated herewith, also had a branch in Logan.

This action was commenced July 9, 1963 to obtain a declaratory judgment that the Comptroller is prohibited by Section 36(c) (1) of the National Bank Act from authorizing the Petitioner Bank to establish and operate its branch in Logan and for injunctive relief against the operation thereof by the Petitioner Bank.

In a memorandum decision entered on September 30, 1964 [4] the District Court entered judgment dismissing the complaint. Although the court noted that under Utah law a state bank was prohibited from opening a branch in its home city if it was the only bank having its main office there, it concluded that since Utah law did permit operation of branches under some circumstances not then applicable to the city of Logan [5] "new branches" were "ex-

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[4] R 37-45, 234 F. Supp. 74 (D. Utah 1964).

[5] The court relied upon *Walker Bank & Trust Co. v. Taylor*, 15 Utah 2d 234, 390 P.2d 592 (1964). UTAH CODE ANNOT. §§ 7-3-6, -6.3 (Supp. 1965) contain a general prohibition of branch banks but permit branches (1) in cities of the first class and unincorporated parts of their counties

pressly authorized" by Utah law within the meaning of Section 36(c) (1) and the Comptroller had power to authorize the Petitioner Bank's branch.[6]

The Tenth Circuit reversed,[7] holding:

> [T]he purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said . . . that state law will *in each instance* determine whether to permit a national bank to branch. . . . It seems to us a frustration of that policy to say as the trial court did that merely because a state in a broad general way sanctions branch banking, that is enough to permit a national branch, even though other vital provisions of state branching laws are not met. . . . [W]e believe the proper approach is . . . to look at all the state law on branch banking not just part of it.[8]

ARGUMENT

Introduction and Summary

Congress has authorized the Comptroller to approve the establishment and operation of a new branch by a national bank "within the limits of the city . . . in which said association is situated, if *such establishment and operation are at the time expressly authorized* to State banks by the law of the State in question. . . ."[9] We urge that the federal statute means that a new branch of a national bank is permitted only if state law would in *that instance*

(Salt Lake City and County), (2) in other incorporated areas where there is no existing unit bank, and (3) in other incorporated areas where there is an existing unit bank by a "take-over" of an existing bank.

[6] R 41, 234 F. Supp. at 77.

[7] R 48-56, 352 F.2d 90 (10th Cir. 1965).

[8] R 55-56, 352 F.2d at 94. (Emphasis added.)

[9] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964). (Emphasis added.)

sanction the establishment and operation of *that* branch for a state bank similarly situated. The law of Utah prohibits the authorization and establishment of a new branch bank in Logan by a state bank; therefore, the action of the Comptroller and Petitioner Bank in establishing a new branch facility is contrary to law.

The overriding policy which Congress accepted in the original passage of Section 36(c) (1) was that if two systems of banking, state and federal, are to long coexist, there must be competitive equality between the two systems. Prior to 1927 some states permitted the establishment of branch banks, and it was the competitive advantage thus achieved by some state banks which resulted in federal legislation permitting national banks to branch. In passing Section 36(c) (1) in substantially its present form Congress' primary objective was to effect equality between the two systems with respect to establishing branch banks. The arguments of opponents and proponents of branch banking were considered, the opponents taking the position that liberal branching would lead to undue concentrations of banking power and to local dependence upon "out-of-town" bankers. Presumably in deference to the arguments of the opponents, Congress concluded it should permit states to determine the policy of local branch banking, and in so doing the main objective of competitive equality for the national system was to be protected. Congress did not go beyond saying that the two banking systems insofar as branches are concerned should "compete on equal terms . . . where the States make the competition possible,"[10] and Congress cast aside any decision in favor of or against branch banking. In this light the Comptroller's attempt to instigate a liberal branching rule for national banks

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[10] 77 CONG. REC. 5896 (1933) (remarks of Representative Luce reporting the bill from conference).

based upon such pro and con arguments, if applied, would severely frustrate the efforts of Congress to establish competitive equality between the two systems by causing a recurrence of the prior evil through favoring national banks over state banks.

It has been conceded that under the circumstances of this case applicable state law prohibits the establishment of a "new branch" by a state bank. We contend that as a result of such prohibition the "establishment" of the Petitioner Bank's branch is not "expressly authorized," and that upon this basis alone, without any resort to rules of statutory construction or to an analysis of the extent to which state law has been adopted, the case should be decided in favor of the Respondent. However, the decision of the trial court in this case rests on a unique position taken by the Comptroller in the interpretation of Section 36(c) (1) involving the extent to which that section adopts state law as the governing authority for establishing new branches by national banks. As will hereinafter appear, the term "unique" is used advisedly.

I

THE ESTABLISHMENT AND OPERATION OF THE PETITIONER BANK'S NEW BRANCH VIOLATES SECTION 36 (c) (1), BECAUSE SUCH ESTABLISHMENT IS NOT "EXPRESSLY AUTHORIZED" BY STATE LAW.

There is no difficult complexity or ambiguity in Section 36(c) (1).[11] It authorizes a national bank to establish a "new" branch within the city in which its main office is located (an "inside" branch), if (1) "such establishment" is "at the time expressly authorized to State banks by the law of the State in question," and (2) the Comptroller's approval is given. It is clear that the pertinent "law of the

[11] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964).

State" is the law of the State "at the time" of the particular establishment and that determination of whether a new branch is "expressly authorized" must be made in *each instance* of an establishment and in respect to *the* particular establishment, i.e., with respect to "such establishment." The meaning of the term "new" branch seems equally clear since in subsection (b) of Section 36[12] Congress has dealt with take-overs of existing branches, and it must therefore be concerned in Section 36(c) with de novo establishments, i.e., branches not derived by merger, consolidation or otherwise from a previously existing banking house.

(A) The "Law of the State" Does Not Authorize the Petitioner Bank's New Branch Nor Does It Authorize Any New or De Novo Branches.

The Utah statute on branch banking provides that "no branch bank shall be established or authorized to conduct a banking business except as hereinbefore . . . expressly provided."[13] The only exception from this general prohibition of branch banks by the State of Utah which could apply to the circumstances of the Petitioner Bank's branch states that "except in cities of the first class . . ., no branch bank shall be established in any city or town in which is located a *bank or banks,* state or national, regularly transacting a customary banking business, *unless the bank seeking to establish such branch shall take over an existing bank.*"[14] It is conceded that if the Petitioner Bank were a

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[12] 76 Stat. 667, (1962), 12 U.S.C. § 36(b)(2) (1964).

[13] UTAH CODE ANNOT § 7-3-6.3 (Supp. 1965). The same substance is contained in the opening sentence of UTAH CODE ANNOT. § 7-3-6 (Supp. 1965).

[14] UTAH CODE ANNOT. § 7-3-6 (4th para.) (Supp. 1965). (Emphasis added.) In unabridged form § 7-3-6 (4th para.) provides:

Except in cities of the first class or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks,

state bank, the law of Utah would preclude it from establishing and operating its new branch.[15] The city of Logan, in which the Petitioner Bank is located, is not a city of the first class,[16] and the Petitioner Bank in seeking to establish such branch and in establishing the same did not take over an existing bank.[17] Thus, under the Utah law applicable to this case branches are prohibited subject only to a limited exception relating to a "take-over" of an existing bank, and new or de novo branches[18] are totally prohibited.

Prior to the argument and final hearing in the lower court in this case, the Supreme Court of the State of Utah decided *Walker Bank & Trust Co. v. Taylor*[19] which holds that, except in a city of the first class, Sections 7-3-6 and -6.3 of the Utah Code, *supra*, expressly prohibit the establishment of a new branch in any city or town in Utah where a unit bank is located. The facts in that case are identical with those in the instant case, except that the defendants in the *Taylor* case were the Bank Commissioner of the State of Utah and a state bank located in Provo, Utah, also a city of the second class. Thus, the meaning

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state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

[15] R 38-39, 234 F. Supp. at 76-77.

[16] R 12.

[17] R 13.

[18] The term "new branch" or "de novo branch" as used in connection with Petitioner Bank's branch refers to an additional banking house established by a bank and not theretofore in existence, as distinguished from a banking house of a constituent banking corporation of a merger or consolidation which is retained and operated as a branch by the resulting bank.

[19] 15 Utah 2d 234, 390 P.2d 592 (1964).

and effect of the applicable Utah Statute is conclusively established. [20]

In reaching its decision in the *Taylor* case, the Supreme Court of the State of Utah states:

> We are of the opinion that our statute is restrictive and, what it does not expressly permit, it prohibits. There is but one method of establishing a branch bank in a city of less than the first class having an existing unit bank and that is by "taking over" such bank. The legislative history of branch banking is of great significance. In 1911, the legislature enacted a statute which absolutely prohibited branch banking. It was not until 1933 that the legislature relaxed this prohibition and permitted branching under certain conditions and circumstances. During the period between 1911 and 1933 the legislature evidently was of the opinion that branch banking was not in the public interest, possibly because it might impair the stability of the existing banks. This reasoning could well have influenced the law makers when they saw fit to allow branch banking, but only under certain restrictive conditions. This legislative history lends support to the proposition that what our branch banking laws do not permit they prohibit. [21]

The establishment and operation of the Petitioner Bank's new branch is conditioned, by the clear and unambiguous language of Section 36(c) (1), upon such establishment and operation being "at the time expressly authorized to state banks by the law of the state in question." The *Taylor* decision conclusively establishes that the law of Utah does not "expressly authorize," but expressly prohibits, the operation of such a branch to state banks; therefore, the establishment and operation of the Petitioner Bank's branch violates the federal statute.

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[20] *First Nat'l Bank v. Missouri*, 236 U.S. 640, 656 (1924).
[21] 15 Utah 2d 234, 236-37, 390 P.2d 592, 594 (1964).

(B) Petitioner Bank's New Branch is Not Expressly Authorized by the Law of the State Within the Meaning of Section 36(c)(1).

The meaning of the term "expressly authorized" is in controversy in this case. We contend that since the law of Utah would prohibit a state bank from opening a branch similar to the Petitioner Bank's new branch, there is no express authorization in state law within the meaning of Section 36(c) (1). The Petitioners on the other hand, while conceding that a branch would not be "expressly authorized" if Utah prohibited all branch banks, rely on the premise "that § 36(c) (1) embodies only the requirement that inside branching be 'expressly authorized' to state banks by state law without other conditions or restrictions of state law. . . ." [22] Thus, they argue that "even though a state bank in an identical situation with that presented here could not establish a branch bank, nevertheless a national bank could because state law generally sanctions branch banking." [23] We support our contention, first, on the premise that there is no express authorization because Utah law prohibits all "new branches" in cities such as Logan and, second, that even if Utah law is presumed to authorize some branches it would not authorize a new branch *in this instance,* and we contend that Section 36(c) (1) requires application of state law to the particular facts of each new branch of a national bank.

1. Section 36(c) (1) permits establishment of "new branches" if such establishment is expressly authorized by state law. Both the Utah statutes and Section 36 clearly distinguish and treat separately new branches and branches acquired by a merger or consolidation. Since in Section 36(c) (1) Congress was dealing, not with "take-over" branches, but with "new" or de novo ones, it is clear that

[22] R 51, 352 F.2d at 92.
[23] *Ibid.*

the inquiry into whether the state expressly authorizes new branches should be limited to whether new branches, as distinguished from take-over branches, are authorized by state law.

The take-over proviso of Section 7-3-6 of the Utah Code [24] recognizes this distinction and as a safeguard against the use of the merger route as a subterfuge for acquiring a new branch provides:

> No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

Section 36(c) of the federal statute pertains exclusively to "new branches."[25] The acquisition by national banks of branches by a merger or consolidation is dealt with separately in subsection (b) (2) of Section 36, which provides as follows:

> (2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office, which, immediately prior to such consolidation, was in operation as —
>
> > (A) a main office or branch office of any bank, (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comp-

[24] UTAH CODE ANNOT. § 7-3-6 (4th para.) (Supp. 1965).
[25] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c) (1964).

troller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such state from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation. [26]

The merger proviso of the Utah statute cannot be converted to the requisite "express authority" under state law for the establishment of "new branches" by national banks under subsection (c) of Section 36. In fact, subsection (b) (2) of Section 36, which also incorporates state law as the standard for a national bank's acquisition of a branch by a merger or consolidation, makes it clear that Congress did not intend to adopt state law relating to the acquisition of branches through a merger or consolidation as "express authority" for the establishment of "new branches" under subsection (c). [27] In addition, Section 36(c) (1) itself shows it was meant to be limited in scope to new branches. It provides that "new branches" may be

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[26] 76 Stat. 667 (1962), 12 U.S.C. § 36(b)(2) (1964).

[27] See S. Rep. No. 2040, 87th Cong., 2d Sess. (1962).

established if "such establishment" is expressly authorized by state law.

2. State statutory authority for branching, as applied to national banks, cannot be fragmented so as to sever the limitations contained therein with respect to branch banking by state banks. A contrary contention was rejected by the Tenth Circuit in its opinion in this case where the court stressed that "State law will in *each instance* determine whether to permit a national bank to branch."[28] The court's reference to "each instance" has merit, because it stresses the natural emphasis of the word "such" as it is used in Section 36(c) (1). Congress would not have said "if *such* establishment and operation are at the time expressly authorized," if it had intended to say "if *any* establishment is expressly authorized" as the trial court in this case has assumed.[29]

Other federal courts are in harmony with the Tenth Circuit.[30] For example, the Fifth Circuit in a case involv-

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[28] R 55, 352 F.2d at 94. (Emphasis added.)

[29] In R 41 n.8, 234 F. Supp. at 78 n.8 the court states:

That there are conditions for such establishment, including . . . the acquisition of another bank, does not change the "express authority" into a lack of authority on the part of State banks or a lack of a statutory expression of such authority, and does not add to the Federal statute a requirement that compliance be made by National banks with all State conditions.

[30] *Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965) (effect given to state law "pursuant to a strong and distinct 'policy of equalization' for our dual banking system"); *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958) ("[T]he Michigan statute . . . is here controlling. . . ."); *Security Bank v. Saxon*, Civil No. J-65-C-46, E.D. Ark., June 22, 1966 (relying on the 10th Cir. at 6); *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 401 (E.D. Mich. 1965); *Commercial Security Bank v. Saxon*, 236 F. Supp. 457 (D.D.C. 1964) (affirmed by the D.C. Cir. and consolidated with the instant case in this court) ("[E]xact standards of the Utah branching law must be applied. . . ."); *South Dakota v. National Bank*, 219 F. Supp. 842 (S.D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); *Suburban Trust Co. v. National Bank*, 211 F. Supp.

ing an inside branch has said that a national bank is precluded from opening a branch, "unless a *similary situated* state bank would be authorized under state law to open a similar office," [31] and the case upon which Petitioners rely for support is not inconsistent with that interpretation. [32]

It is equally clear from the legislative history [33] of Section 36(c) that the law of the state is to be applied in "each instance." Senator Glass, Chairman of the Senate Committee on Banking and Currency and sponsor of the 1933 Act, in reporting the provision on the floor of the Senate said it "required that the establishment of branch banks by national banks in States which by law permit branch banking should be *under the regulations required by State*

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694 (D.N.J. 1962); *Commercial State Bank v. Gidney*, 174 F. Supp. 770, 775 (D.D.C. 1959), *aff'd per curiam*, 278 F.2d 871 (D.C. Cir. 1960) (It was "the apparent purpose of Congress to have *exactly* the same standards . . . apply to . . . national bank branches as apply to the establishment of state bank branches.").

[31] *Jackson v. First Nat'l Bank*, 349 F.2d 71, 72-73 (5th Cir. 1965). The court also said: "Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct 'policy of equalization' for our dual banking system." *Id.* at 74.

[32] In *First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965), the issue was whether in approving an "outside" branch pursuant to 12 U.S.C. § 36(c)(2) the Comptroller must comply with the inquiries and ascertainments required of the state banking authority in the exercise of its discretion. It was held that the discretion of the Comptroller is unfettered by such state guidelines to executive decision, a position with which we agree since section 36(c) provides that a branch may be established only "with the approval of the Comptroller of the Currency." *Id.* at 272. The issue contained in the instant case was not there presented, but the court noted in harmony with the other cases of lower federal courts that the Comptroller's action should be measured by the criteria enumerated in 12 U.S.C. § 36(c), namely, "whether the establishment of the branch is 'authorized to State Banks' *and* the location conforms to the restriction of State laws." *Ibid.* (Emphasis added.)

[33] The legislative history has not been set forth in this brief in detail because of the exhaustive treatment of it in the Brief for Respondent, Commercial Security Bank, Nos. 73 and 88.

Law of State banks." [34] On another occasion Senator Glass stressed this very point in countering a motion to strike the provision:

> Mr. Glass. . . . Section 19 as we now have it provides an exceedingly limited degree of branch banking *in only those States the law of which permit branch banking, and only to the extent that the State laws permit branch banking,* and I think it would be most unfortunate to strike that section out.
>
> Mr. Copeland. Mr. President, I think I understand the Senator, and that is my own thought about it, that as we have amended the bill it permits branch banking only in those States where the State laws permit branch banking by State banks.
>
> Mr. Glass. *Only in those States and to the extent that the State laws permit branch banking.* [35]

Again Senator Glass stated his position with regard to the meaning of Section 36(c) (1) when he said: "What we mean is that national banks may have branches in those States which permit the same privilege to State banks." [36]

Remarks of other members of Congress, not as intimately concerned with the bill as Senator Glass, also show they understood the same connotation. Senator Vandenberg said the section provides "that the branch banking privilege so far as national banks are concerned shall follow the status established by State law in respect to the State privilege." [37] Representative Bacon also commented that branches may be established provided "this is permitted by laws of that State *and subject to them."* [38]

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[34] 77 CONG. REC. 3726 (1933). (Emphasis added.) Senator Glass had originally favored allowing national branches regardless of state law but had eventually acceded to the measure in its present form.

[35] 76 CONG. REC. 2511 (1933). (Emphasis added.)

[36] 76 CONG. REC. 1997 (1933).

[37] 76 CONG. REC. 2262 (1933).

[38] 77 CONG. REC. 3949 (1933). (Emphasis added.)

(C) The Overriding Policy to be Served in Section 36 (c) (1) is the Competitive Equality of State and National Banking Systems.

At the time Section 36(c) (1) was enacted[39] no unanimity had been reached by Congress on whether or to what extent branch banking had merit and should be allowed. The act in its final form was a partial concession to the opponents of branching by Senator Glass, who had favored liberal branching by national banks, and it appears from the legislative history that agreement was reached only upon the understanding that competitive equality between state and national banking systems was to be effected.[40] As a result, a national policy on the merit and desirable extent of branch banking was not established, and Congress was content to defer to the policies of the individual states.

This intent of Congress was reiterated by Representative Luce, a member of the Conference Committee on the Glass-Steagall Act, when he was reporting on the results of the Conference. He said:

> He [Mr. Goldsborough] has withdrawn the obstacle in the way by consenting to branch banking in States that explicitly permit it for banks chartered under

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[39] 48 Stat. 189 (1933), as amended, 12 U.S.C. § 36(c)(1) (1964).

[40] In reporting S. 1631 on the floor of the Senate, Senator Glass said:

> It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those States which by law permit branch banking to State banks. It went even further under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which by law permit branch banking should be *under the regulations required by State law of State banks.*
>
> How any fair person may properly object to a provision of that sort, I do not understand. We here in the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; *and*

> their own laws, such States being now a dozen or so in number. In the controversy over the respective merits of what are known as "unit banking" and "branch banking systems," a controversy that has been alive and sharp for years, branch banking has been steadily gaining favor. It is not, however, here proposed to give the advocates of branch banking any advantage. *We do not go an inch beyond saying that the two ideas shall compete on equal terms* and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail. [41]

Also Senator Glass in settling on that position said, "We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand." [42]

Thus, both the lower federal courts which have been cited[43] and the legislative history of Section 36(c) support our contention that Congress intended to insure competitive equality in branching by national and state banks. Congress, of course, could have regulated branching by national banks in total disregard of the limitations thereon applicable to state banks under the various state laws. The legislative history of Section 36(c) demonstrates, however, that Congress chose to provide for competitive equality in

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why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate. 77 CONG. REC. 3726 (1933). (Emphasis added.)

[41] 77 CONG. REC. 5896 (1933). (Emphasis added.)

[42] 77 CONG. REC. 3726 (1933) (remarks of Senator Glass, Committee Chairman and sponsor of the bill). See 76 CONG. REC. 1996-97 (1933) (exchange between Senator Glass and Senator Wheeler).

[43] Cases cited note 30, *supra.*

this important area of banking by adopting the state law applicable to branching by state banks as the controlling authority for branching by national banks. In so doing, Congress has clearly manifested its intention with respect to both inside branching by national banks (subdivision (1) of Section 36(c)) and outside branching (subdivision (2) of subsection (c)) "that a national bank should have no greater rights than it would if it were a state bank." [44]

In considering the legislative history of Section 36(c), it is important to recognize the gross competitive imbalance in branching by national and state banks in Utah that would result if the Petitioners' position were sustained. If the take-over proviso of the Utah statute were to constitute the requisite authority for the establishment and operation of new branches by national banks, the door would be open for new inside branching by national banks in every city and town in the State of Utah,[45] and the result would be a reappearance of the evil the 1927 and 1933 legislation was intended to correct, except that on this occasion the national banks, instead of state banks, would have the advantage of the more liberal branching rules and, hence, the competitive advantage Congress has sought to avoid.[46]

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[44] *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958). In *Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965) it was said:

Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct policy of equalization for our dual banking system.

[45] It must be conceded that, if the trial court's construction in this case were followed, it would be equally applicable to cases of outside branches under Section 36(c)(2). See R 40-41, 43-44, 234 F. Supp. at 77, 70, where it was held that Utah's take-over exception to a general prohibition of branches was express authorization of "new branches" in contemplation of Section 36(c)(1).

[46] *Cf. Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965), which on its facts suggests that a similar unequal result would be reached in Georgia on the Comptroller's theory.

In contrast to state-wide branching authorized to national banks that would have resulted under the lower court's decision in this case, the law of Utah prohibits state banks from establishing new branches in any city or town in Utah, except only in Salt Lake County (the only county in which a city of the first class is located) and in those few instances in a city or town where a unit bank is not already located and transacting business. Under the present status of the Utah law the only recourse of state banks with such a competitive disadvantage would be to convert to national banks, which would eventually destroy the dual banking system. Utah might, of course, amend its branch banking law to give to state banks the same branch banking principles as would then be accorded to national banks. This, however, would be contrary to the policy announced in Section 36(c)(1). With respect thereto the Court of Appeals in this case states:

> [T]he purpose of allowing national banks to branch was to enable them to fairly compete with state banks. . . . It is clear to us that the Congress intended to create and maintain a competitive equality between state and national banks. The trial court's interpretation of Congressional intent is to the contrary and would result in giving the national banks a substantial competitive advantage. . . .[47]

II

SECTION 36 (c) (1) MAKES REFERENCE TO ALL STATE RESTRICTIONS WHICH LIMIT THE EXTENT OF BRANCHING; THEREFORE, THIS CASE DOES NOT REQUIRE AN INQUIRY INTO THE AMOUNT OR THE TYPE OF STATE LAW RESTRICTIONS WHICH ARE MADE APPLICABLE TO NATIONAL BANKS.

Section 36 (c) (1) authorizes the Comptroller to approve the establishment and operation by national banks of

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[47] R 55-56, 352 F.2d at 94. See the statement of Judge Walsh in the case consolidated herewith, 236 F. Supp. at 460-61, Record in No. 73, at 30-31.

new inside branches if such establishment and operation are then expressly authorized to state banks by the law of the state in question. There is no differentiation in the statute between various types of state law restrictions, and any restriction which would prohibit or limit the extent of branching is included by the terms of the statute. There is also nothing in the legislative history, no discussion and no basis in policy, which would require a result not in keeping with the plain meaning of the statute.

We do not contend, however, that Section 36 (c) (1) incorporates state administrative discretionary procedures such as the determination of need and convenience or economic feasibility to make them applicable to national banks, the type of restrictions involved in *First National Bank v. Saxon.*[48] This case does not involve similar administrative restrictions or present such an issue; it involves an obvious legal restriction on the extent of branch banking — a simple and direct prohibition of branch banking with one take-over exception engrafted. Insofar as this case is concerned, the Utah law is so clearly a restriction upon the extent of branching that the issues on the fringe relating to administrative discretion referred to above are not involved.

(A) A Construction Making Only State Geographical Restrictions Applicable to National Banks is Not in Keeping with Section 36 (c) (1).

One of Petitioners' arguments is that the difference in language between the provisions of subparts (1) and (2) of Section 36(c) supports the Comptroller in his approval of Petitioner Bank's new branch. This argument was erroneously adopted by the trial court in this case. It reasoned that the difference in language between (1) and (2) reinforced its conclusion that the authorization by state law of *any* branch, though not of the particular branch in ques-

[48] 352 F.2d 267 (4th Cir. 1965).

tion, was the requisite "express authorization" by state law to allow national banks to establish and operate new branches without further regard to state law restrictions. In the court's opinion a footnote to this proposition reads:

> 9—Subdivision (1) refers only to the condition "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;" while subdivision (2) adds, among other things, the additional qualification that such establishment of branches by national banking associations shall be "subject to the restrictions as to location imposed by the law of the State on State banks. . . ."[49]

It is not apparent how the language of subdivision (2) quoted by the trial court supports the conclusion that the take-over proviso of the Utah statute constitutes the requisite "express authority" under Utah law for the establishment of the new branch by the Petitioner Bank. If the word "location" in subdivision (2) has any significance in interpreting subdivision (1), it would qualify rather than expand the application of state law in governing the establishment of outside branches by national banks. In fact, the language in subdivision (2) referred to by the trial court was the basis of the argument by the appellants (the national bank and the Comptroller) in the *Wayne Oakland* case "that Congress intended to permit a national bank to establish a branch at any point within the state at which the state law permitted the establishment and operation of a branch of a state bank, . . ."[50] and that the limitations contained in the state statute with respect to outside branching were not applicable to national banks. The *Wayne Oakland* case held to the contrary. Also in *Commercial Security Bank v. Saxon,* the opinion of Judge Walsh states:

> In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the

[49] R 41, 234 F. Supp. at 78.

[50] 252 F.2d 537, 540 (6th Cir.), *cert. denied,* 358 U.S. 830 (1958).

purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.[51]

Furthermore, if the view of Petitioners were upheld that only state restrictions as to location have been adopted, it would lead to results which would be totally out of harmony with any objective of Congress in enacting Section 36(c)(1), and the extent of branching by national banks in the various states would depend upon whether a state's legislature in limiting branching had elected to do so by means of location restrictions or some other type of restrictions.[52] For example, if a numerical restriction were placed on branches in one state and a location restriction in another, presumably on Petitioners' location restriction theory national banks could branch at the will of the Comptroller in the numerical restriction state but would be strictly subject to the restrictions of state law in the location restriction state.

(B) State Laws Which Limit the Extent of Branching, Such as the Utah Law, are Clearly Applicable to New Branches of National Banks.

There is no necessity in this case to define precisely which restrictions under state laws have been adopted by Section 36(c)(1), since Utah's law is clearly encompassed by that section. The legislative policy of competitive equality can be served only if all state restrictions which limit the extent of branching are considered binding upon the Comptroller. If any other position were adopted the outcome would be a competitive imbalance which is not in keeping with the policy of the federal law.

> Congress did not have to give this effect to state law. But it is highly significant that Congress did give it

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[51] Record in 73, at 31, 236 F. Supp. at 461.

[52] See, for example, the restrictions in *Jackson v. First Nat'l Bank*, 349 F.2d 71 (5th Cir. 1965).

such effect and that it did so pursuant to a strong and distinct "policy of equalization" for our dual banking system.[53]

The Utah statute has from its inception been restrictive of the extent of branching. Prior to 1933 branches were prohibited,[54] but in 1933 the predecessor to the present statute was enacted.[55] It contained the present take-over exception and in addition would have permitted new branches in second class cities if "the consent of all banks therein located" could be obtained. This second exception was later held unconstitutional by the Utah Supreme Court and the take-over proviso was retained on the ground it was separable from the unconstitutional portion.[56] In *Walker Bank & Trust Co. v. Taylor,* the Utah Supreme Court stressed the limiting effect of Section 7-3-6. "[O]ur statute is restrictive and, what it does not expressly permit, it prohibits. . . ."[57] Whatever the specific reason the Utah Legislature might have had in enacting the take-over proviso, there can be no doubt the general policy of Utah law is to *restrict the extent of branching.* To permit the Comptroller to freely allow national banks to branch because of the exception in Utah's general prohibition of branches would be exactly contrary to the competitive equality principle of the federal statute.

The Comptroller asserts that the take-over proviso of Utah law "does *not* embody the kind of state branching policy which Congress, by proposing deference, intended to protect . . . ,"[58] and that, therefore, it is not within the scope of Section 36(c). In so doing he now asserts arguments re-

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[53] *Jackson v. First Nat'l Bank,* 349 F.2d 71 (5th Cir. 1965).
[54] Laws of Utah, ch. 25, § 32 (1911).
[55] Laws of Utah, ch. 6, § 1 (1933).
[56] *Union Trust Co. v. Simmons,* 116 Utah 422, 211 P.2d 190 (1949).
[57] 15 Utah 2d 234, 390 P.2d 592 (1964).
[58] Brief for the Comptroller of the Currency, p. 19.

lating to competition and undue concentration of banking power as a proponent of liberalized branching by national banks which in 1933 were made by the opponents of branch banking.[59] This argument is not sound: (1) It is based on the premise that Section 36 (c) (1) was intended by Congress to favor branch banking, a policy Congress, with determined purpose, elected not to make but deferred to the states; (2) the policies of competition, which he states were intended by Congress in enacting Section 36(c)(1) would not be served, for example, First Security Bank of Utah, a national bank and the largest bank in the State of Utah having in addition to its main office forty-three branches and three banking facilities,[60] Petitioner in No. 73, would be permitted, with the approval of the Comptroller, to establish any number of branches in the city of Ogden; whereas, the Commercial Security Bank, the state bank and the Respondent in No. 73, would be prohibited from branching in that city and the competition between the two would be effectually destroyed; (3) if Utah's "take-over" proviso violates public policy or is otherwise invalid[61] the outcome of this case would be unchanged because the general prohibition in Utah law denying branches would remain effective[62] and the federal statute would continue to unequi-

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[59] *E.g.*, 76 CONG. REC. 1449-50 (remarks of Senator Bratton).

[60] OPERATING BANKING OFFICES INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION AS OF JANUARY 1, 1966.

[61] The Constitutional issue in this case was remanded by the Court of Appeals, R 49, 56, 352 F.2d at 95. In making his argument the Comptroller raises an example of a state restriction permitting new branches only if the unit wishing to branch has a charter at least fifty years old stating, "Such a restriction . . . cannot be deemed applicable to the national banks of the State." Such a restriction was recently held unconstitutional in *Security Bank v. Saxon*, Civil No. J-65-C-46, E.D. Ark., June 22, 1966. Naturally an unconstitutional restriction on branching is not applicable to a national bank or anyone else.

[62] Utah law contains a general prohibition of branches from which exceptions are made. UTAH CODE ANNOT. § 7-3-6.3 (Supp. 1965).

vocally prohibit the new branch;[63] and (4) a merger within the intendment of Utah Code Annot. Section 7-3-6 (1965 Supp.) for the purpose of this case would be assumed to be a lawful merger and one completed after necessary compliance with all superior and applicable state and federal law and regulations.

Although the Utah statute might or might not be what the Comptroller wants or even what is most desirable, it does limit the extent of branching in the state, and for that reason it is the type of state law to which Section 36(c)(1) refers in determining whether the establishment and operation by the Petitioner Bank of its new branch is "at the time expressly authorized to State banks by the law of the State in question. . . ."

III

THE QUESTION OF THE TRIAL COURT'S JURISDICTION

At the trial of this case in the District Court, Petitioner Bank challenged the court's jurisdiction by a Motion to Dismiss. The trial court found and determined that it had jurisdiction over the subject matter and denied Petitioner's motion. The only record on appeal with respect to the proceedings had in the trial court on Petitioner's motion is a minute entry: "Motion of counsel for the First National Bank of Logan to dismiss was denied."[64] Thus the issue of jurisdiction was determined by the trial court.

The Court of Appeals did not review or decide the matter of jurisdiction as thus developed but addressed itself ex-

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[63] *Cf. Security Bank v. Saxon*, Civil No. J-65-C-46, E.D. Ark., June 22, 1966.

[64] R 36.

clusively to the merits[65] and remanded certain other issues which the Petitioner Bank had raised.[66]

We continue to rely on 28 U.S.C. Section 1331 as a basis for the trial court's jurisdiction; and, in addition, we claim jurisdiction under 28 U.S.C. Section 1337,[67] a provision which does not require a minimum jurisdictional amount.[68]

CONCLUSION

The Court of Appeals should be affirmed.

Respectfully submitted,

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[65] The opinion of the Circuit Court of Appeals states: "Our sole question pertains to the authority of the Comptroller to issue such certificate." R 5, 352 F.2d at 91.

[66] R 56, 352 F.2d at 95.

[67] *First Nat'l Bank v. First Bank Stock Corp.*, 197 F. Supp. 417, 419, 421, 425 (D. Mont. 1961), *aff'd*, 306 F.2d 937 (9th Cir. 1962). Section 1337 provides:

The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

See *International Assoc. of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 684-85 & n.2, 696, *rehearing denied*, 373 U.S. 947 (1963).

[68] *Caulfield v. U.S. Dept. of Agriculture*, 293 F.2d 217, 222 n. 10 (5th Cir. 1961), *cert. denied*, 369 U.S. 858 (1962).